Supreme Court, U.S.
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No. 92-1453

In The

Supreme Court of the United States

October Term, 1992

MARCUS E. COLLINS and
THE GEORGIA DEPARTMENT OF REVENUE,

Cross-Petitioners,

v.

CHARLES J. REICH,

Cross-Respondent.

On Cross-Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 4 U.S.C. § 111 was law before *Davis v. Michigan*, 489 U.S. 803 (1989).

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BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

Cross-Respondent in the above-styled action opposes the Cross-Petition for Writ of Certiorari to the Supreme Court of Georgia. The Georgia Supreme Court was correct in applying *Davis v. Michigan Dept. of Treasury,* 489 U.S. 803, 109 S. Ct. 1500 (1989), retroactively. The litigant in *Davis* received retroactive relief, and *James B. Beam Distilling Co. v. Georgia,* 501 U.S. ___, 111 S. Ct. 2439 (1991), requires that Cross-Respondent receive equal treatment. Further, *Davis* raises no issue of retroactivity because 4 U.S.C. § 111 has been law since 1939. A grant of certiorari to the State would only further delay resolution

of the ultimate issue in these tax cases, that is, whether citizens who paid illegal taxes will recover refunds.[1]

CITATION TO OPINION BELOW

The opinion of the Georgia Supreme Court is reported at 262 Ga. 625, 422 S.E.2d 846 (1992). The full text of this opinion is included as Appendix A to the Petition for Writ of Certiorari.

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[1] This Court has witnessed only the beginning of the shenanigans the states will engage in to deny refunds. There are at least three *Davis* cases before the Court where states have denied refunds regardless of retroactivity. Georgia's *sua sponte* creation of a new procedure, the subject of the Petition for Certiorari, has been roundly criticized in The Journal of Multistate Taxation, Vol. 3, No. 3, May/June 1993, p. 84. South Carolina's post-*Davis* litigation precluding refunds is before this Court in *Bass v. South Carolina*, No. 91-1697. Arizona's judicial creation of an administrative remedy is pending in *Bohn v. Waddell*, No. 92-1748. In addition to these cases, the Court has before it *Northwest Bank Duluth, N.A. v. Minnesota Comm'r of Revenue*, No. 91-2047 and *Woosley v. California*, No. 92-1605. These non-*Davis* cases also involve the artful use of procedure to deny refunds of illegal taxes.

Although not yet before the Court, the charade taking place in the Wisconsin Tax Court is noteworthy for the direct and improper intervention of the Governor to influence the judicial process to deny refunds. *See Hogan v. Wis. Dept. of Revenue*, Wis. Tax App. Commission, Docket No. 91-I-386, Statement of Commissioner Douglas H. Bartley (April 8, 1993). This statement of recusal has not been reported yet, but previous developments in this case are reported at § 203-337 CCH Wis. Tax Rptr., 15,630 (1992).

STATEMENT OF THE CASE

Beginning in 1931, Georgia's income tax scheme provided exemptions for both federal and state retirees, 1931 Ga. Laws 24. These exemptions were soon repealed, and Georgia created patchwork exemptions for particular classes of state retirees over the next four decades. This practice culminated in 1980 when the various exemptions were consolidated in one statute to provide that virtually all retirement benefits paid by the State were exempt from state income taxation, O.C.G.A. § 48-7-27.

In Arkansas, the House recently passed HB 1827 (Ark. Gen. A/Reg. Sess. 1993) which provides that the state shall keep any illegal taxes collected before a court declares the tax illegal. This bill was defeated in the Arkansas Senate, but is expected to be reintroduced in the May session of the General Assembly.

In addition to this case and the two cited above from South Carolina and Arizona, there are five other *Davis* related cases pending: *Pledger v. Bosnick*, No. 91-375 (Ark.); *Harper v. Virginia Dept. of Taxation*, No. 91-794, *cert. granted*, 112 S.Ct. 1934 (1992); *Swanson v. North Carolina*, No. 91-1436; *Sheehy v. Montana Dept. of Revenue*, No. 91-1473; and *Duffy v. Wetzler*, No. 92-521 (New York). Since the *Harper* oral argument, Alabama has ordered refunds, and approximately $30 million in refunds are being issued. Oklahoma is officially stayed pending *Harper*; others appear to be unofficially stayed.

The states have clearly figured out that, after *McKesson* and *Beam*, the retroactivity game is up. *See* Harper Oral Argument Addresses Taxpayer Remedy, Tax Administrators News, December 1992 at 137. The new game for denying refunds of illegal taxes is "procedural bars." *Id.* at 144. A refund of illegal taxes is the only meaningful backward-looking relief available in these cases, but the states have served notice that they will pursue whatever mischief is necessary to prevent refunds.

No exemption was provided for federal retirees in the 1980 statute, and federal retirees protested this unequal treatment. In 1981, 1982, and 1983, bills were introduced in the Georgia House of Representatives to provide an exemption for federal retirees. These bills were not passed, and federal retirees were not afforded the income tax exemption received by state retirees.

In February 1985, a group of federal retirees filed a class action in U.S. District Court in Augusta challenging Georgia's taxing scheme and seeking refunds. The retirees asserted that the scheme violated 4 U.S.C. § 111 and the constitutional doctrines of intergovernmental immunity and equal protection. The Eleventh Circuit dismissed the retirees' action on jurisdictional grounds, holding that state procedural remedies were adequate even though a class action was not available against the State or its agency. *Waldron v. Collins,* 788 F.2d 736 (11th Cir. 1986).

During the 1980's Georgia experienced unprecedented economic growth. It was not a poor state starved for revenues. From 1985 to 1988, the State accumulated a revenue surplus of $193.4 million. During this period, the State has estimated that it collected $200 million in income tax from federal retirees. Thus, the revenue surplus was almost equal to the amount of taxes collected from federal retirees.[2]

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[2] Several other states also enjoyed surpluses sufficient to offset refunds to retirees. These include Alabama, Arizona and Wisconsin. *See, Harper v. Va. Dept. of Taxation,* Case No. 91-794, Brief of *Amicus Curiae* on behalf of the military coalition in support of petitions, July 16, 1992, fn 16, pp. 18-19.

Shortly after *Davis* was decided in March 1989, thousands of Georgia retirees filed refund claims under Georgia's refund statute. As of March 1992, the State estimated its exposure for *Davis* refunds for 1985-88, the tax years covered under the statute, at $87 million (including interest). The State has revised this estimate twice downward from an original estimate of $250 million. Even if the new figure is correct and the State refunds it all, the State will still have profited immensely from the illegal tax.

After *Davis,* Cross-Respondent initially filed a direct action for refunds. That suit was dismissed because he failed to follow the procedure of the refund statute. He then filed a claim under the refund statute, and, after it was denied, Cross-Respondent initiated this action in the Superior Court of Clayton County, Georgia. The trial court denied Cross-Respondent's claim for refunds on the ground that *Davis* should not be applied retroactively under the analysis of *Chevron Oil v. Huson,* 404 U.S. 97 (1971).

The Georgia Supreme Court held that this Court's decision in *Jim Beam Distilling Co. v. Georgia,* 501 U.S. ___, 111 S. Ct. 2439 (1991), mandated retroactive application of *Davis* because the taxpayer in *Davis* received the benefit of retroactive relief. This holding is the subject of the Cross-Petition for Certiorari filed by the State.

Although the Georgia court applied *Davis* retroactively, the court held that the refund statute did not apply, and that Colonel Reich had no remedy. This holding is the subject of the main Petition for Certiorari filed in this action.

ARGUMENT

I. RETROACTIVITY IS REQUIRED BY BEAM.

Where a state tax is found to be unconstitutional and is applied retroactively to the litigant in one case, that finding must also be applied retroactively to all other litigants not barred by procedural requirements or res judicata, *James B. Beam Distilling Co. v. Georgia*, 501 U.S. ___, 111 S. Ct. 2439 (1991). In *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 109 S. Ct. 1500 (1989), the taxpayer received retroactive relief in the form of a refund. The state in *Davis* conceded that a refund was appropriate because of the Michigan refund statute, and this Court held that the taxpayer was entitled to a refund under the authority of *Iowa-Des Moines Bank v. Bennett*, 284 U.S. 239, 247, 52 S. Ct. 133, 136 (1931), *Davis*, 109 S. Ct. at 1508-1509. *Davis* remanded the case for consideration of the remedy, 109 S. Ct. 1509. Because the plaintiff in *Davis* received retroactive relief, Colonel Reich is entitled to retroactivity under *Beam*.

Beam references and cites *Davis* as having been applied retroactively, 111 S.Ct at 2445-446. When this Court remanded *Davis* for consideration of the remedy issue, it necessarily implied that *Davis* was to be given retroactive effect.

This is precisely what occurred in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S. Ct. 3049 (1984), where the Court remanded the case for consideration of the effect on the remedy of a "pass-through defense. This is what led the Court in *Beam* to conclude that *Bacchus* was applied retroactively: "Because the Court in *Bacchus*

remanded the case solely for consideration of the pass-through defense, it thus should be read as having retroactively applied the rule there decided." *Beam*, 111 S. Ct. at 2445.

The State has argued that *Beam* does not apply in *Davis* litigation because the issue of retroactivity was not considered by the Supreme Court in *Davis*. According to this view, *Beam* would apply only if this Court had independently decided retroactivity in *Davis*. This identical argument was made and rejected by the plurality in *Beam*.

In *Beam*, the Court decided the taxpayer was entitled to retroactive relief because a similarly situated taxpayer had been granted retroactive relief in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S. Ct. 3049 (1984). In dissent, Justice O'Connor argued that *Bacchus* should not be applied retroactively because the *Bacchus* court did not analyze and decide the issue of retroactivity. She points out that *Bacchus* is silent on the retroactivity question:

> The *Bacchus* Court erred in applying its rule retroactively. It did not employ the *Chevron Oil* analysis, but should have. Had it done so, the Court would have concluded that the *Bacchus* rule should be applied prospectively only. Justice Souter today concludes that, even in the absence of an independent examination of retroactivity, once the Court applies a new rule retroactively to the parties before it, it must thereafter apply the rule retroactively to everyone.

(111 S. Ct. at 2451) (emphasis added).

The *Beam* plurality accepted this reading of its ruling, and it rejected the notion that an independent examination of retroactivity makes a difference. For the plurality, the issue was equal treatment:

> Thus, the question is whether it is error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so. We hold that it is, principles of equality and *stare decisis* here prevailing over any claim based on the *Chevron Oil* analysis.

(111 S. Ct. at 2446).

To the *Beam* Court, whether or not *Bacchus* conducted an independent examination of retroactivity under *chevron* was "unnecessary to our ruling here." 111 S. Ct. at 2445, n. 2.

Beam says simply that a ruling applied to one litigant must be applied to future litigants. Whether there was a contested analysis of retroactivity in the underlying case is irrelevant. The *Beam* plurality made it clear that it doesn't matter **why** retroactive relief was granted. Thus, because the litigant in *Davis* received retroactive relief, Cross-Respondent is entitled to the same.

II. THERE IS NOTHING "NEW" ABOUT DAVIS.

Whatever analysis the Court applies, a purely prospective application of *Davis* requires a prior determination that *Davis* established a new principal of law. The facts in these cases simply cannot support such a finding.

4 U.S.C. § 111 has been law since 1939. The states make three basic arguments in claiming that *Davis* is new

law. First, the states claim that before *Davis*, 4 U.S.C. § 111 did not apply to retired compensation. This defies the plain reading of the statute and ignores several authorities, including *Zucker v. U.S.*, 758 F.2d 637, 639 (Fd. Cir.) *cert. denied*, 474 U.S. 842 (1985); and *Kizas v. Webster*, 707 F.2d 524, 536 (D.C. Cir. 1983) *cert. denied*, 464 U.S. 1042; *Clark v. United States*, 691 F.2d 837 (7th Cir. 1982).

The states also claim that the "significant differences" test applied in *Davis* was a surprise, and that an equal protection test was the appropriate standard. This ignores the "significant differences" test clearly enunciated in *Phillips Chemical Co. v. Dumas Independent School Dist.*, 361 U.S. at 383, 80 S. Ct. at 479 (1960). Even the dissent in *Davis* conceded that, "Arguably the court's holding today is merely a logical extension of our decision in *Phillips Chemical Co. v. Dumas Independent School Dist.*, 361 U.S. 376, 80 S. Ct. 474 (1960) and *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392, 103 S. Ct. 692 (1983)." 489 U.S. at 803, 109 S. Ct. at 1512.

Moreover, any test or analysis, even "significant differences," is a *limitation* of 4 U.S.C. § 111, not an expansion. The purpose of *Chevron* and its progeny is to protect litigants from abrupt changes *expanding* liability. *American Trucking Co. v. Smith*, 110 S.Ct. at 2334. On its face, the protection provided by 4 U.S.C. § 111 is absolute and total. *Davis* certainly did not, indeed, could not, expand this protection. Thus, if *Davis* is "new," its only new in restricting the statute, and it cannot be used to invoke *Chevron*.

Finally, Georgia and other states claim that because 23 states engaged in this illegal taxation over a period of

years, this fact renders *Davis* new law. Under this view, the number of violators should be considered in determining whether a practice is illegal, and the larger the magnitude and the longer the violation, the greater the reason to avoid retroactivity. In other words, the rioting mob is right simply because it is a mob.

The more important question is whether any jurisdiction anywhere, at anytime, reasonably reached the legal conclusion that a tax exemption for state retirees was permissible under 4 U.S.C. § 111. The record is completely devoid of any such evidence. The states cannot point to a single case or statute that supports taxing federal retirees while exempting state retirees.

CONCLUSION

The fundamental problem with the state decisions in *Davis* cases is that they contribute to the erosion of the average citizen's respect for the law. These taxes clearly violated a federal law, and many states have statutes that plainly purport to require refunds. The irony is that the victims of these holdings are not average. By definition, they have served their country for more than twenty years, and many of them, including Col. Reich, risked their lives for democratic principles like the Rule of Law.

Moreover, these decisions make bad law, and they do not have the excuse of being hard. It did not require a constitutional scholar to warn Georgia's legislature that these taxes might violate 4 U.S.C. § 111, particularly after the state was sued on this ground in 1985. Nevertheless,

Georgia and other states persisted in this questionable taxation.

States should be required to scrupulously consider the statutory and constitutional rights of their citizens before taxing them. Special interests create powerful incentives for discriminatory taxation. Allowing a state to keep unconstitutional taxes provides a financial incentive to aggressively levy taxes even where there are doubts as to the legality of the tax. When a proposed tax is of questionable legality, states should be strongly encouraged to seek revenues in the broad expanse of constitutionally permissible taxation.

No legal purpose is served by allowing the states to keep these taxes. The states did not have the right to collect these taxes, and they should not have the right to keep them.

Respectfully submitted,

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